No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

BEEKMAN PAPER CO., *Petitioner*,

v.

CRANE & CO., INC.; RICHARD W. KERANS; THOMAS A. WHITE; HAMILTON DAVIS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 31, 1991

QUESTION PRESENTED

Does the decision of the Second Circuit affirming the lower court's failure to deny respondents' removal petition from the state court under 28 U.S.C. § 1446(b)&(c); and, petitioner's motion to remand under 28 U.S.C. § 1447(c), when as a matter of law there was no basis for said decision - especially so since the respondents' position was perjury as a matter of law - not only conflict with this Court's and the Circuit's decisions and depart so far from the usual and accepted course so as to call for this Court's supervision; but, perhaps stronger, threaten the constitutional principle of FEDERALISM, especially since there was no jurisdiction in the federal system to decide anything other than that there was no federal jurisdiction?

LIST OF PARTIES

The parties to the proceeding below were the petitioner BEEKMAN PAPER CO., and the respondents CRANE & CO., INC., RICHARD W. KERANS, THOMAS A. WHITE, and HAMILTON DAVIS.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

BEEKMAN PAPER CO., *Petitioner,*

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Beekman Paper Co., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above entitled proceeding on October 4, 1991.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit is not published by order of said Court, and is reprinted in the appendix hereto, a 1, *infra*.[1]

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[1]References to the record in the Second Circuit are from the Joint Appendix ("1").

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1446(a)&(b), respondents sought to remove the previously brought action against them by petitioner in the state of New York; and, petitioner invoked federal jurisdiction under 28 U.S.C. § 1447(b) seeking remand back to the state court.

On petitioner's appeal, the Second Circuit affirmed.

The jurisdiction of this Court to review the judgment of the Second Circuit is 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. §§ 1446(a)&(b), and 1447(b) are reprinted in the appendix hereto, a 7 *infra*.

STATEMENT OF THE CASE

Introduction

Beekman ("petitioner"), a New York corporation since 1916, engaged in the distribution of fine printing paper, had enjoyed

for more than a quarter century until in 1990 Crane ("respondents") terminated it, a distributorship agreement with Crane. Ignoring the clear custom and usage in the paper industry and as specifically agreed to by Crane and Beekman, Crane terminated Beekman as a distributor without cause, asserting reasons it could not and did not prove.

Beekman sued Crane in New York. All defendants were served but only Crane sought removal. More than thirty days passed following the service of process upon all the defendants, including in Massachusetts by a sheriff of the state. Then, Beekman moved to remand to New York.

Crane and the other respondents - Kerans, White, and Davis, - after Beekman's remand motion now all joined in the removal petition claiming they had not been properly served with process. This, despite having just a week earlier moved along with Crane in the federal action below to dismiss Beekman's complaint for

failure to state a cause of action substantively, (i.e. claiming oral agreement terminable at will). Thus all defendants (i.e. respondents) not only conceded then that all had been served with process, but they - the non Crane defendants as Crane - were by the motion to dismiss on substantive grounds - showing their eagerness to advance the litigation as bona fide served defendants.

The state summons and complaint was served properly upon all defendants, (77-80)[2]. In Massachusetts, the sheriff's office served White and Kerans, (77-78, 129-32). White was served at Crane's Massachusetts headquarters, (13-14), on December 20, 1990, personally by the sheriff, at 3:45 P.M. Sheriff Marcella, clearly identified White's description, (77). The attorneys for White, (and all the defendants), admitted that at the very moment White was served, he was "in his office [Crane] that day",

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[2] References to the record are the Second Circuit joint appendix, e.g., ("1").

(156); but the reason the sheriff was able to so accurately describe White was because:

> "As to the [White] description, Crane is pretty big in Dalton. And we have every reason to believe White is a man of the community, and the process server may know what he looks like...." (156; emphasis supplied).

Thus White's attorney - without seeking a hearing - baldly denied that White was so served, claiming White got the process from another employee; that there was no subsequent mailing to White[3], (156). White simply claimed no service without any offer of fact or believable fact, (103-04).[4]

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[3] Correct. Personal service under New York law C.P.L.R. § 308(2), obviates that requirement.

[4] At the district court level White's attorneys, a large, respected, experienced national law firm, did not explain why either they did not catch this alleged bad service before Beekman's remand motion, or what in fact was their knowledge of the service; relying instead on specious avoidance, (11, 27; see especially 100, ¶ 4; 152-54).

Beekman's counsel at every opportunity challenged defendants and their attorneys to do more than make their absurd, bare bones fact

Kerans was served also on December 20, 1990, at Crane's headquarters, 3:45 P.M., by the sheriff of Massachusetts leaving the summons and complaint with "Bonnie Jennings his executive secretary", whom he exactly describes; then mails another copy to Kerans, (78). Keran's affidavit is as mendacious as White's. Without any supporting documents or an affidavit from Ms. Jennings, he denies she is his secretary,[5] yet somehow, "later received the...Summons and verified Complaint that Ms. Jennings had received". Kerans claims not to have received the mailing, (102-102A).

Beekman challenged Keran's and his attorneys as he did White to make proof; they failed.

Davis was served in New York on December 12,

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denials of service, (63-4, 108-110, 112-17, 129-32, 136-45, 147-50, 161-62). The record is clear: neither respondents or their attorneys have even made an attempt.

[5] An irrelevancy under the CPLR of New York since the receiver need only be a person of suitable age and discretion, clearly the case as the unanimous New York decisional law compels.

1990 by the same licensed process server who - uncontestedly - served Crane, (79-80). The process was left with "Jacquilen Gardner", who is precisely described and identified, followed by a mailing, (80). Davis' affidavit opposing Beekman's papers on the removal and for remand was replete with even more mendacity than White's and Kerans'. He denied Crane's New York existence at its exact New York address; that Ms. Gardner was employed by Crane; and, that he ever got a mailing[6], (105-07).

Davis's additional, desperate attempt to avoid the service is shown by the record conclusively proving every "fact" denying Crane's New York identity to be pure mendacity, (13, 114-15, 121, 122-23, 124-28).

Equally significant, the petition for removal brought only by Crane, was dated January 2, 1991, (6-11). However, on January 9, 1991, less

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[6] Thus, two process servers in two states perjured themselves on everything; except that, (according to defendants), maybe the mail got lost every time.

than one week later, all defendants moved to dismiss the complaint on substantive, not procedural, grounds, (29-34, 87-88). All the non Crane defendants would never have so moved if in fact they had not been validly served.[7]

REASON FOR GRANTING THE WRIT

The Second Circuit's decision refusing remand and upholding removal was an unconstitutional as well as unlawful misuse of federalism

Under 28 U. S.C. § 1446(a)&(b), the Petition for Removal must be joined in by all defendants and within thirty days of service of process. See 14A Wright, Miller, Cooper, Federal Practice and Procedure § 3723, p. 308 (West

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[7] Thus if respondents had any case for removal, it was waived since they all moved to dismiss for failure to state a cause of action, thus continuing their status as defendants and necessarily conceding service upon them, since a party cannot seek removal of an action that has not yet come into bona fide legal existence, i.e., invalid service.

Thus, White, Kerans, and Davis, joining in the removal petition on January 30, 1991, (99-107), was considerably more than 30 days after all were served.

1985). This is the law as pronounced by this Court, Kinney v Columbia Savings & Loan Ass'n, 191 U.S. 78 (1903).

The Second Circuit opinion is also in hideous conflict with its and its district court decisions. See, Synergy Gas Co. v Sasso, 853 F.2d 59, 62 (1988); McKay v Point Shipping Corp., 587 F. Supp. 41, 43 (S.D.N.Y. 1987); People v Mitchell, 637 F.Supp. 1100, 1102, (S.D.N.Y. 1986); Gold v Blinder Robinson & Co. Inc., 580 F.Supp. 50, 54, (S.D.N.Y. 1984); Golar v Daniels & Bells, Inc., 533 F. Supp. 1021, 1024 (1982); Touche, Ross & Co. v Manufacturers Hanover Trust Co, 503 F.Supp. 222, 223 (S.D.N.Y. 1980); D. Meglio v Italia Crociere Internationale, 502 F. Supp. 316, 318 (S.D.N.Y. 1980). Acccd, Universal Motors Group v Wilkerson, 674 F. Supp. 1108, 1110 (S.D.N.Y. 1987); Boland v Bank Sepah-Iran, 614 F. Supp. 1166, 68 (S.D.N.Y. 1985), strictly construing the removal statute against removal and in

favor of remand under 28 U.S.C. § 1447(c)[8], citing to the thirty day requirement of 28 USCA § 1446(b); Martropico Compania Naviera S.A. v Perusahaan, etc, 428 F. Supp. 1035 (S.D.N.Y. 1977).

The Second Circuit decision conflicts no less with every other federal circuit.[9] Its reliance upon Sicinski v Reliance Funding Corp., 461 F.Supp. 649, 652 (S.D.N.Y. 1978) (a 7) reduces to a trifle the concept of federalism. In Sicinski, the attorney simply forgot to sign the permission to remove - hardly the case here.

A fortiori its allowance of clear perjured - ludicrous really - contestation of the affidavits of service by state licensed

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[8] All the authorities cited herein for removal speak concurrently to remand.

[9] See, Garza v Midland Nat'l Ins. Co., 256 F. Supp. 12 (D.C. Fla. 1966); Dodrill v New York Cent. RR., 253 F. Supp. 564 (D.C. Ohio 1966); McGlasson v Barger, 220 F. Supp. 938 (D.C. Colo 1963); Norwich Realty Corp. v U.S. Fire Ins. Co., 218 F. Supp. 484 (D.C. Conn. 1963).

(sheriff, etc) officials (a 4-5). This position is preposterous: until this decision by the Second Circuit no Circuit would tolerate such naked, state court jurisdiction robbing. See, San Rafael Compania Naviera, S.A. v American Smelting & Rel. Co., 327 F.2d 581 (9th Cir 1964); Hicklin v Edwards, 226 F.2d 410 (8th Cir. 1955).

See especially, Hill v Sands, 403 F. Supp. 1368 (D.C. Ill. 1975). Accd, Trustees v Perfect Parking, 126 F.R.D. 48, 52 (N.D. Ill. 1989); Republic Productions, Inc. v American Federation of Musicians, 173 F. Supp. 330 (D.C.N.Y. 1959); Halpert v Appleby, 23 F.R.D. 5 (S.D.N.Y. 1958).[10]

At risk here is over a century of congressional intent respecting the states' rights to their proper court jurisdiction under principles of federalism. See, Judiciary Act 1789,

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[10] In the process bulldozing its own, good law lower courts' holdings. See e.g., Vozeh v Good Samaritan Hospital, 84 F.R.D. 143, 144 (S.D.N.Y. 1979).

Ch.29, 21 Stat. 73, 79-80.[11]. Equally, this Court has historically strictly construed the acts of Congress to avoid defeating unlawful, i.e., non statutorily justified defendant attempts to remove to the federal courts, Shamrock Oil & Gas Corp. v Sheets, 313 U.S. 100 (1941). See especially, Louisville & Nashville R.Co. v Mottley, 211 U.S. 149 (1908); American Fire & Casualty Co. v Finn, 341 U.S. 6 (1951).

The egregiousness of the result below is intensified by the recognition that the uncontested record shows that Beekman had

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[11]That historically has meant removal only upon proper use of statutory law, Martin v. Hunter's Lessee, 1 Wheat. 304 (U.S.1816); The Moses Taylor, 4 Wall. 411, 429-30 (1867); The Mayor v Cooper, 6 Wall. 247 (U.S.1868); Railway Co. v Whitton, 13 Wall. 270 (U.S.1872); Cain v Commercial Publishing Co., 232 U.S. 124 (1914); Great No. Ry. v Alexander, 246 U.S. 276 (1918), etc.

Indeed, while Congress has broadened, tailored, etc, the statutory basis, see e.g., Judiciary Act of 1987, 24 Stat. 552, as modified by Act of August 13, 1888, 25 Stat. 433, carried on in essence to this day, nothing allows what has gone on in the instant case under color of proper awareness of federalism.

without basis in fact or law an exclusive distributorship terminated abruptly by respondents after a quarter century; and, by a federal district judge with no more authority to so decide than Hauptmann had to kidnap the Lindberg baby.

CONCLUSION

For these various reasons, including most prominently concepts of federalism, this petition for certiorari should be granted.

Respectfully submitted,

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Counsel of Record

December 31, 1991

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Fourth day of October, one thousand nine hundred and ninety-one.

FILED OCTOBER 4, 1991

Present:

HONORABLE RICHARD J. CARDAMONE

HONORABLE JOHN M. WALKER

HONORABLE JOSEPH M. McLAUGHLIN,

Circuit Judges.

BEEKMAN PAPER COMPANY,

Plaintiff-Appellant, ORDER

v. Docket No. 91-7538

CRANE & CO., INC.; RICHARD W. KERANS; THOMAS A. WHITE; HAMILTON DAVIS,

Defendant-Appellees.

A1

Appellant Beekman Paper Co. (Beekman) appeals the February 13, February 28, and April 29, 1991 orders and judgment of the United States District Court for the Southern District of new York (McKenna J.) denying its motion to remand the case to state court dismissing its complaint and entering judgment in favor of appellee Crane & Co., Inc. et al. (Crane).

Crane manufactured high quality paper that Beekman had distributed for more than 25 years pursuant to an oral agreement. According to Beekman, custom and usage in the trade precluded termination of the distributorship absent unsatisfactory performance on its part. Further, according to Beekman, despite its satisfactory performance, Crane terminated the distributorship on October 30, 1990, effective February 28,1991. Beekman sued Crane, its president (White), its manager (kerans) and one of its sales representatives (Davis) collectively the "individual defendants") in the Supreme Court of New York, New York County, on December 12, 1990. On January 2, 1991 Crane filed a petition for

removal in the Southern District, jurisdiction premised on diversity of citizenship. Beekman sought to have the action remanded to state court, which the district court denied on February 13.

On february 28, the district court dismissed Beekman's causes of action for breach of contract,anticipatory breach of contract, and for punitive damages, all without leave to replead. Beekman's causes of action for intentional interference with contractual relations, conspiracy and for trade disparagement were dismissed with leave to replead. Beekman did not replead, and the trial court dismissed the complaint in its entirety on April 19. Judgment was entered for the defendants on April 29.

(1) On appeal, Beekman challenges the district courts refusal to remand the action to state court. Pursuant to U.S.C. § 1446(a), "[a] defendant or defendants desiring to remove...shall file in the district court...a notice of removal...." consequently its motion

to remand should have been granted, because all defendants did not join in the petition. Plaintiff's contention is that the petition was deficient because made only by Crane. The individual defendants claimed their failure to participate in the petition was justified because service as to them was deficient. Only properly served defendants need join in the petition. Further, we agree with the district court's holding that even if, arguendo, the individual defendants were properly served and failed to join in the petition, such defect is curable, especially in the absence of any showing of prejudice to plaintiff. See Sicinski v. reliance Fundings Corp., 461 F. Supp. 649, 652 (S.D.N.Y. 1978) (of primary importance is only the defendants be unanimous is their choice of a federal forum). Consequently, the affidavits of the individual defendants indicating their consent to the removal, on the facts here, were sufficient to satisfy the requirements for removal. Whether service was proper or not and whether objections to service

were waived are irrelevant.

(2) Appellant also challenges the district court's dismissal of its causes of action for breach of contract and anticipatory breach of contract. Beekman alleges that pursuant to custom and usage in the industry, a distributorship agreement may only be terminated for cause. That may be so. Nonetheless, because the alleged oral agreement contained no term limitation and could not be performed within one year, it falls within the New York Statute of Frauds and is hence unenforceable. See D & N Boening, Inc. v. Kirsch Beverages, Inc., 63 NY2d 449 (1984). As plaintiff concedes, according to the terms of the agreement, only by its (plaintiff's) failure to perform adequately, i.e., breaching the agreement, could defendant justifiably terminate. However agreements "terminable within one year only upon a breach of one of the parties" are within the Statute of Frauds. Id. at 456. If the agreement between the parties was in some form reduced to writing or otherwise not within the Statute of Frauds then

the agreement could be enforceable. Only then would ambiguity or silence as to termination make custom and usage in the trade relevant to assessing the terms and/or conditions under which the putative distributorship could be terminated.

(3) We have reviewed plaintiff's other contentions and find none of them to have merit.

The orders and judgment are affirmed.

s/
Richard J. Cardamone, U.S.C.J.

s/
John M. Walker, U.S.C.J.

s/
Joseph M. McLaughlin, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

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§ 1446 Procedure for removal

(a) A defendant or defendants desiring to remove any civil action...from a State court shall file in the district court of the United States...a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal....

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt of the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim upon which such action or proceeding is based....

§ 1447. Procedure after removal generally

* * *

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice for removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

No. 91-1092

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BEEKMAN PAPER CO.,

Petitioner

v.

CRANE & CO., INC.; RICHARD W. KERANS; THOMAS A. WHITE; HAMILTON DAVIS,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should *certiorari* be granted to review the Court of Appeals' decision that the District Court was correct to deny a motion to remand because regardless of whether all defendants were properly served, the failure of all defendants to join the petition for removal based on diversity was curable, where diversity was not defeated, all defendants consented to removal and the plaintiff made no showing of prejudice?

PARTIES TO THE PROCEEDING

The parties to the proceedings below all appear in the caption of this case. Pursuant to Rule 29.1 of this Court, Crane & Co., Inc. states that it has no parent company and that the following subsidiary is not wholly owned:

Technical Graphics, Inc.

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No. 91-1092

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BEEKMAN PAPER CO.,

Petitioner,

v.

CRANE & CO., INC.; RICHARD W. KERANS;
THOMAS A. WHITE; HAMILTON DAVIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

I

COUNTERSTATEMENT OF THE CASE

Preliminary Statement

Respondents, Crane & Co., Incorporated ("Crane"), and Richard W. Kerans, Thomas A. White, and Hamilton Davis (collectively the "Individual Defendants"), respectfully request that this Court deny the petition for a writ of *certiorari* of Beekman Paper Company, Inc. ("Beekman") to review the judgment of the United States Court of Appeals for the Second Circuit (the "Petition")[1]. It is respectfully submitted that this case does not merit Supreme Court review. Petitioner has utterly failed to demonstrate "special and important reasons" for granting *certiorari*, as required by the Rules of the United States Supreme Court. Accordingly, the Petition should be denied.

Counterstatement Of Facts

The Statement of the Case presented in the Petition contains numerous misstatements of fact, includes much irrelevant material, and misstates and omits holdings of the Court of Appeals and the District Court. Rather than restate the facts, however, few of which are relevant to the Petitioner's asserted grounds for *certiorari*, Crane and the Individual Defendants adopt and incorporate herein the statements of facts contained in the District Court's opinions, dated

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1 Citations to the Petition appear herein as "Pet. at _."

February 13, 1991 and February 28, 1991, which are reprinted at pages RA-1 and RA-4, respectively, of Respondents' Appendix.[2]

A. BASES FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The Petition's statement of the bases for federal jurisdiction in the District Court is incorrect. Petitioner cites 28 U.S.C. §§ 1446 and 1447 as the bases for federal jurisdiction below. However, these statutes merely govern the procedures for removal to the federal district court. The District Court had jurisdiction over the case pursuant to 28 U.S.C. § 1332, on the grounds that complete diversity between the parties exists, and the amount claimed to be in issue exceeds $50,000, exclusive of interest and costs. The District Court also had jurisdiction pursuant to 28 U.S.C § 1441 which permits removal on the grounds of diversity of citizenship, if none of the defendants is a citizen of the state in which the action is brought.

B. THE DECISIONS BELOW

The District Court denied Petitioner's motion to remand. Both the District Court and the Court of Appeals found the issue of whether the Individual Defendants had been properly served to be irrelevant. The District Court, relying on *Browne Bros. Cyper. Corp. v. Carver Bank of Miami, Fla.*, 287 F. Supp. 700, 702 (S.D.N.Y. 1968), found that as to any of the Individual Defendants

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2 Petitioner has failed to comply with Rule 14(k) of this Court which requires its Appendix to include a copy of both the Court of Appeals opinion sought to be reviewed and the District Court opinions in the case. As Petitioner has failed to include the District Court opinions in its Appendix, Respondents have attached these opinions hereto.

who had not been served at the time the removal petition was filed, failure to join the removal petition did not defeat removal.[3]

In addition, both the District Court and the Court of Appeals found that even assuming, *arguendo*, that the Individual Defendants had been properly served, their failure to join the petition for removal was a curable defect that was not time-barred. Petitioner's Appendix ("PA") at 4; RA at 2. Both courts cited *Sicinski v. Reliance Funding Corp.*, 461 F. Supp. 649, 652 (S.D.N.Y. 1978) for this proposition. *Id.* In agreeing that the petition for removal could be amended to include the Individual Defendants, the Court of Appeals stated that "the defect is curable, especially in the absence of any showing of prejudice to plaintiff." PA at 4.

C. THE ISSUE BEFORE THIS COURT

The only issue before this Court is whether the Court of Appeals correctly decided that the Individual Defendants' failure to join the removal petition was a curable defect, where diversity existed, all defendants consented to removal, and plaintiff was not prejudiced by the removal. While Respondents continue to believe that only properly served defendants must join a petition for removal, and that in this case the Individual Defendants were not properly served, this argument was deemed irrelevant by the Court

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3 Following its denial of Petitioner's motion to remand, the District Court denied Petitioner's motion for a preliminary injunction, and granted Respondents' motion to dismiss, holding, *inter alia*, that the distributorship arrangement between the parties was unenforceable under the Statute of Frauds. RA at 6-8.

of Appeals, and thus should be irrelevant before this Court.[4] *See Youakim v. Miller*, 425 U.S. 231, 234 (1975) ("'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed'") (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)).

Petitioner nevertheless clutters its Petition with arguments that the Individual Defendants were properly served. Petitioner would have this Court believe that had the Court of Appeals reached the issue of whether the Individual Defendants had been properly served, the result below would have been different. However, as discussed, *supra*, the Second Circuit's holding is supported by *Sicinski*, which held that a served, non-signatory defendant would be permitted to cure a defective petition for removal by amending the petition to include its signature, even though the time for seeking removal had passed. *See also Pepsico, Inc. v. Wendy's International, Inc.*, 118 F.R.D. 38, 42 (S.D.N.Y. 1987) ("a statement of grounds for removal may be clarified through amendment even after passage of the 30 days for filing the petition").

More importantly, as the Court of Appeals did not deem it necessary to consider this issue, it is not properly before this Court. *See Youakim*, *supra*. Even if the courts below *had* addressed the issue of whether service was properly effected, it would not be appropriate for this Court to review such a wholly fact-based inquiry. *See National Labor Relations Board v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981)

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4 It should be noted that there is some disagreement among district courts regarding whether 'service' means 'proper service' in the removal context. *Compare Love v. State Farm Mut. Auto. Ins.*, 542 F. Supp. 65, 68 (N.D. Ga. 1982) to *Tyler v. Prudential Ins. Co.*, 524 F. Supp. 1211 (W.D. Pa. 1981). No Court of Appeals has yet decided this issue. In any event, this disagreement is not before this Court.

(where Court is "presented primarily with a question of fact, [this] does not merit Court review"); *United States v. Johnston*, 268 U.S. 220, 227 (1924) ("We do not grant a *certiorari* to review evidence and discuss specific facts").

II

NO SPECIAL OR IMPORTANT REASONS EXIST WHICH WARRANT CERTIORARI REVIEW

This case does not present the "special and important reasons" necessary to justify granting a writ of *certiorari*. Moreover, none of the traditional reasons for *certiorari* review is present here. The Second Circuit's decision does not conflict with the decision of any other circuit court, nor with any decision of the Supreme Court. The decisions cited by Petitioner in support of its Petition are readily distinguishable on the questions of law and on the facts presented in those cases. Finally, this case presents no important or unsettled issue of federal law warranting this Court's review.

A. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OR THIS COURT

The cases on which Petitioner relies to support its argument that the Court of Appeals' decision is in conflict with a decision of this Court or of other Courts of Appeal are, at best, inapposite. The few Supreme Court cases and one circuit court case cited by Petitioner

which touch upon the removal issue in no way conflict with the Court of Appeals' decision below.[5]

In *Kinney v. Columbia Savings & Loan Ass'n*, 191 U.S. 78 (1903), relied upon by the Petitioner, this Court construed an earlier version of the removal statute which required proof of diversity to appear on the face of complaint. Although the plaintiff had not met this requirement, the *Kinney* court nevertheless *affirmed* the decree of the district court denying the motion to remand, because the failure to comply with this requirement did not prejudice the plaintiff. This result is completely consistent with the Court of Appeals' holding in this case, which upheld the District Court's denial of Petitioner's motion to remand in the absence of any showing of prejudice to Petitioner.

Synergy Gas Co. v. Sasso, 853 F.2d 59 (2d Cir. 1988), cited by Petitioner, is also consistent with the Court of Appeals' decision herein. In *Synergy*, the Second Circuit *retained* jurisdiction of the case, finding that the removal petition had been timely filed.[6]

Furthermore, neither the result in *Synergy* or that in *Kinney* would affect the Court of Appeals' decision in this case, which was based on the only case on point - - *Sicinski v. Reliance Funding Corp.*, 461 F. Supp. 649 (S.D.N.Y. 1978). Petitioner completely mischaracterizes *Sicinski*, claiming that it is a case in which "the attorney simply forgot to sign the permission to remove." Pet. at

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5 In addition, none of the district court decisions cited by Petitioner address the issue relevant to this case, namely, whether defendants who have consented to removal may cure a possibly defective petition to include their signature.

6 Indeed, the results in both *Synergy* and *Kinney* contradict Petitioner's statement to this Court that "[a]ll the authorities cited herein for removal speak concurrently [sic] to remand." Pet. at 10 n.8.

10. In *Sicinski*, however, one of two named *defendants* failed to sign the removal petition, and the district court permitted this defendant to file an affidavit consenting to removal after the 30-day filing period had expired. Accordingly, the Court of Appeals' decision is not inconsistent with any decision of this Court or any Court of Appeals. Rather, it is consistent with all of the cases cited by Petitioner, and follows from the precedent relied upon by the Court of Appeals.

B. THIS CASE DOES NOT RAISE AN IMPORTANT ISSUE OF UNSETTLED FEDERAL LAW

Dissatisfied with the adverse decisions of the District Court and the Court of Appeals, Petitioner protests that its case raises federalism concerns to which this Court should now turn its attention. Petitioner has failed to cite any authority for this proposition, and, in fact, there is none. In any event, the Court of Appeals' decision does not offend federalism. Federalism is not even an issue here.

Complete diversity exists between the parties in this case. PA at 3; RA at 2-3. Thus, pursuant to Article III, Section 2 of the United States Constitution, jurisdiction over this case vests in the federal courts. As the District Court clearly had jurisdiction over this case, the case does not present an affront to federalism. The only issue presented is whether the Respondents complied with the technicalities of the removal statute, 28 U.S.C. § 1446.

Federal statutory law has permitted removal of actions from state to federal court for decades. *See* Jud. Code § 28 (1911), 28 U.S.C. § 71 (1940); 28 U.S.C. §§ 1441, 1446, 1447. Removal is simply a mechanism by which a case over which a federal court has jurisdiction is transferred from state to federal court. Removal from

state to federal court is appropriate only if the initial question -- that of whether federal jurisdiction is proper at all -- has been answered in the affirmative. Removal typically raises federalism concerns when a question exists as to the existence of original jurisdiction in the federal courts, or whether removal is available at all and not when the only issue deals with the mechanics of removal. *See, e.g., Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986) (removal improper because federal court did not have original jurisdiction); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) (remanding action when no federal jurisdiction existed because complaint did not present issue "arising under" federal law); *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100 (1941) (cited by Petitioner) (plaintiff against whom counterclaim is asserted cannot remove action it brought in state court). *See also American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1950) and *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908), both cited by Petitioner, finding removal improper where the federal court did not have original jurisdiction.

In this case, complete diversity exists, thus making federal jurisdiction proper. The only question remaining is whether, on the facts of this case, the Respondents complied with the removal statute. This is hardly an important federal question. *See National Labor Relations Board, supra; Johnston, supra.*

CONCLUSION

For the reasons stated above, Respondents respectfully request that Beekman Paper Company's Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit be denied.

Dated: January 31, 1992

Respectfully submitted,

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RESPONDENTS' APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BEEKMAN PAPER COMPANY, INC., :

Plaintiff, : 91 Civ. 0031 (LMM)

-against- : MEMORANDUM AND ORDER

CRANE & CO., INCORPORATED, RICHARD W. KERANS, THOMAS A. WHITE, and HAMILTON DAVIS, :

Defendants. :

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McKENNA, D.J.

Plaintiff moves to remand this action to the Supreme Court of the State of New York, New York County, on the ground that all served defendants did not join in the petition for removal. *See, e.g., Committee of Interns v. N.Y. State Labor Relations Board*, 420 F. Supp. 826, 832 (S.D.N.Y. 1976). For the reasons set forth below, the motion is denied.

The removal petition was filed by defendant Crane & Co. on January 2, 1991. The petition states, as to each of the three individual defendants, that he has not been served. Plaintiff has submitted affidavits of service on such individual

defendants, who, in turn, submit affidavits contesting service. Mr. White, claimed to have been served personally, states that he was not. Messrs. Kerans and Davis, claimed to have been served pursuant to New York Civil Practice Law and Rules § 308(2) (service upon person of suitable age and discretion plus mailing) both state that they have not received the summons and complaint in the mail.

The dispute over whether the individual defendants had, or had not, when the petition was filed, been served, however, need not be resolved to determine the motion. As to any individual defendant who might be found not to have been served, his failure to join in the petition does not defeat removal. *Browne Bros. Cyper Corp. v. Carver Bank of Miami, Fla.*, 287 F. Supp. 700, 702 (S.D.N.Y. 1968). On the other hand, as to any individual defendant who might be found to have been served, the defect is curable. *Sicinski v. Reliance Funding Corporation*, 461 F. Supp. 649, 652 (S.D.N.Y. 1978). Here, the affidavits to Messrs. Kerans, White and Davis all state that they consent to the removal. In *Sicinski*, Judge Pollack, after the time for removal had passed, accepted an affidavit of a defendant, which had not signed the petition, which he "held to cure any defect in the original petition." *Id.* If necessary, the Court accepts the affidavits of Messrs. Kerans, White and Davis, to the extent that they state their respective consents to removal, as curing the defect in the petition that might be found had they been served as of the date of its filing.

Mr. Davis' affidavit is sufficient, for purposes of the present motion, to establish that he is a citizen of the State of Connecticut for diversity purposes. That he is alleged to have a "business residence" at a New York office of

defendant Crane & Co., or a subsidiary of defendant Crane & Co., and concedes working out of such an office, is immaterial. It is Mr. Davis' domicile that governs. *Vitro v. Town of Carmel*, 433 F. Supp. 1110, 1112 (S.D.N.Y. 1977).

Plaintiff's motion for sanctions is denied.

Plaintiff will submit papers in opposition to defendants' motion to dismiss, and defendants will submit papers in opposition to plaintiff's motion for a preliminary injunction, not later than February 21, 1991.

Dated: New York, New York
February 13, 1991

SO ORDERED.

LAWRENCE M. McKENNA
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BEEKMAN PAPER COMPANY, INC., :

Plaintiff, : 91 Civ. 0031 (LMM)

-against- : MEMORANDUM AND ORDER

CRANE & CO., INCORPORATED, RICHARD W. KERANS, THOMAS A. WHITE, and HAMILTON DAVIS, :

Defendants. :

----------x

McKENNA, D.J.

This action was commenced on December 12, 1990, in the Supreme Court of the State of New York, New York County, by service of the summons and complaint on defendant Crane & Co., Inc. ("Crane"). On January 2, 1991, the action was removed to this Court. On January 24, 1991, plaintiff, Beekman Paper Company, Inc. ("Beekman"), moved, by order to show cause, to remand the action to the Supreme Court, and, on February 13, 1991, the motion to remand was denied.

Beekman, at the same time that it moved for remand, moved for a preliminary injunction against Crane's

termination of Beekman as a distributor of paper manufactured by Crane.

Crane moves to dismiss the complaint for failure to state a claim upon which relief can be granted.

According to Beekman's allegations, Crane is a manufacturer of high quality paper, which Beekman has distributed for more than 25 years pursuant to an oral agreement under which, together with the customs and usages of the paper trade, Beekman was to continue as a distributor so long as Beekman distributed Crane's products in a satisfactory manner. By letter dated October 30, 1990, Crane terminated Beekman as a distributor, effective February 28, 1991.

Beekman asserts six claims: (1) and (2) for breach and for anticipatory breach of contract and the customs and usages of the trade, against Crane; (3) for intentional interference with contractual relations, against all defendants[1]; (4) for conspiracy, against the individual defendants; (5) for trade disparagement, against all defendants; and (6) for punitive damages, against all defendants. The complaint does not seek injunctive relief.

The complaint does not specifically allege the area of Beekman's distributorship. From the papers submitted, it appears to have been largely, if not exclusively, concentrated

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1 The defendants other than Crane are its president, Thomas A. White, its Manager, Business Papers Division, Richard W. Kerans, and a sales representative with regional responsibility for the New York City area, Hamilton Davis.

in New York City. In any event, the parties have argued the motion to dismiss on the basis of New York law, and neither party has suggested that the law of any other state is to be applied.

Beekman does not allege that it was a party to a written contract with Crane, and it is clear that, its allegations of the customs and usages of the trade apart, its first and second claims--for breach and anticipatory breach of contract--must be dismissed because the contract alleged is unenforceable under the Statute of Frauds. *D&N Boening, Inc. v. Kirsch Beverages, Inc.*, 63 N.Y.2d 449, 483 N.Y.S.2d 164 (1984).

Beekman argues, however, that it is the custom and usage of the paper trade that oral distribution contracts are not terminable at will, unless the distributor fails to sell in a satisfactory manner. For purposes of Crane's motion to dismiss, this allegation will be taken to be true.

The customs and usages of a trade are not infrequently resorted to in the effort to construe a contract. *See Edison v. Viva International, Ltd.*, 70 A.D.2d 379, 421 N.Y.S.2d 203, 205 (1st Dep't 1979); *U.S. Naval Institute v. Charter Communications, Inc.*, 875 F.2d 1044, 1048 (2d Cir. 1989); *Seven Star Shoe Co., Inc. v. Strictly Goodies, Inc.*, 657 F. Supp. 917, 920 (S.D.N.Y. 1987). In the cited cases, however, reference to customs and usages was made in order to determine the parties' intent in using specific language in a written agreement. *See also, Stulsaft v. Mercer Tube & Mfg. Co.*, 288 N.Y. 255 (1942) (looking to the parties' prior relationship, the custom of the trade and the custom of the defendant in dealing with employees in a situation similar to

that of the plaintiff, in order to supply a commission rate in an agreement to employ the plaintiff for a specified term).

Beekman relies principally on *VistaTech Enterprises v. Brother International*, 677 F. Supp. 178 (S.D.N.Y. 1988), where the plaintiff had been appointed a distributor by an oral agreement not specifying the term of the distributorship, "whether at will or forever." *Id.* at 180. The Court found that "[n]either alternative could have been in contemplation of the parties as a matter of common sense and the economics of trade. On the one hand, the distributor would have to have products available to sell for a reasonable period after issuing its advertisement [approximately two weeks prior to the termination], and on the other, in the absence of any further agreement, VistaTech could not anticipate a perpetual relationship." *Id.* The Court found a custom and usage of "the quotation of prices for a two month period by VistaTech to the trade, a practice known to Brother and made evident by the VistaTech flier." *Id.* at 180-181. The Court found that its construction of the agreement was a "means by which the agreement can be upheld" against the defense of the Statute of Frauds. *Id.*[2] VistaTech was allowed damages for the two month period following termination, but its motion for an injunction against termination was denied. The Court did not construe the agreement as having a "perpetual" term.

VistaTech does not support Beekman's position that the customs and usages of the paper trade may require that an oral distributorship agreement, silent as to its term, be

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2 The Court in *VistaTech* also found the Statute to have been satisfied by two memoranda. *Id.*

construed as lasting forever, in complete disregard of the Statute of Frauds. Such authority as has been called to the Court's attention indicates, rather, that custom cannot "give validity to a contract which the law declares void." *Stulsaft*, *supra*, 288 N.Y. at 260. (Citation omitted.) *See also, Ozier v. Haines*, 411 Ill. 160, 103 N.E.2d 485, 489 (Sup. Ct. 1952) ("We conclude . . . that the customs pleaded could not render nugatory the provision of the Statute of Frauds.")

The first and second claims are, therefore, dismissed. That dismissal, furthermore, requires the denial of Beekman's motion for a preliminary injunction against termination, since that motion is premised on those causes of action.

There is also independent ground for denial of the preliminary injunction sought. Beekman has not made a sufficient showing that termination will cause irreparable injury. It is evident from the papers submitted that Beekman distributes paper products manufactured by companies other than Crane. It appears that the reason proffered by Crane for termination was Beekman's concentration, to the detriment of Crane (at least in Crane's view), on distribution of foreign manufactured paper. Indeed, Beekman's executive vice-president states that "it is precisely the development of foreign sources of paper as a compliment to Beekman's domestic sources that has kept Beekman alive and flourishing in the modern, 1990s world of international business as carried on in the paper industry." In a letter dated July 2, 1990, to defendant Kerans, arguing against termination, Beekman's president states that "[i]n 1983 we were able to obtain the distributorship of two of the worlds' largest producers of coated paper both of which are located in

Europe. Thanks to hard work and good marketing we are now in the position of being able to supply over $8,000,000 of coated paper from stock at twenty-three locations around the country." The same letter also refers to Beekman's distribution of uncoated paper manufactured by U.S. based "mills" (emphasis added) and Beekman's "financial strength to survive." What Beekman's submissions do not contain is specific and detailed information -- such as, for example, a breakdown of Beekman's sales of paper manufactured by Crane and by other distributors, either in general or by customer -- supporting a claim that loss of the Crane distributorship will have the sort of impact on Crane that could not be redressed by money damages.[3]

Beekman's third claim alleges that Crane and the individual defendants, since 1988, "have intentionally and without justification sought to induce clients of Beekman's to cease purchasing Crane paper from Beekman and/or from doing business with Beekman," and that Beekman's agreements with its clients "have been interfered with." The complaint does not allege, however, that any of the agreements between Beekman and its customers have been breached by the customers, and is deficient in that respect. *See Printers II, Inc. v. Professionals Publishing, Inc.*, 615 F. Supp. 767, 774 (S.D.N.Y. 1985), *aff'd* 784 F.2d 141 (2d Cir. 1986). The claim is therefore dismissed, with leave, however, to replead. If the individual defendants are to be renamed in the repleaded claim, the claim must allege facts

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3 The complaint, it may be added, seeks money damages for the alleged breach of contract and the customs and usages of the trade, not specific performance or an injunction -- preliminary or final -- against termination.

sufficient to justify their inclusion. *See Courageous Syndicate v. People-to-People*, 141 A.D.2d 599, 600, 529 N.Y.S.2d 520, 521 (2d Dep't 1988).

Beekman's fourth claim alleges that all of the defendants conspired "to commit the wrongful acts aforepleaded," *i.e.*, breach and anticipatory breach of the agreement between Beekman and Crane, and interference with Beekman's agreements with its customers. Since Beekman's first and second claims relating to breach of the Beekman-Crane agreement are dismissed for the reasons set forth above, the fourth claim, as it relates to that agreement, is also dismissed. Insofar as the fourth claim relates to Beekman's agreements with its customers, it is not clear that it adds much if anything to the third, which names all defendants. Beekman may, however, replead the fourth claim as it relates to Beekman's agreements with its customers should it be so advised, but the claim as repleaded must satisfy the requirements of particularity as to overt acts set forth in *Weg v. Macchiarola*, 654 F. Supp. 1189, 1193-1194 (S.D.N.Y. 1987).

Beekman's fifth claim alleges that the defendants, beginning in 1988, communicated to Beekman's competitors and former and current employees and salespeople that Beekman was going out of business and was going to lose the Crane account, and also that Crane sought to induce Beekman employees and salespeople to leave Beekman.

The first aspect of the fifth claim--communications to the effect that Beekman was going out of business and would lose the Crane account--appear to sound in injurious falsehood or disparagement. *See Diehl & Sons, Inc. v.*

International Harvester Co., 445 F. Supp. 282, 291-292 (E.D.N.Y. 1978). The complaint does not allege, however, either that the statements alleged were false, or special damages, as required.[4] Beekman may replead in a manner satisfying these requirements.

The thrust of the second aspect of the fifth claim--inducement of Beekman employees and salespeople to leave Beekman--is not entirely clear. If it is intended as a claim of injurious falsehood, it fails to allege falsity and special damages. If it is intended to allege interference with contractual relations, it fails to allege that any employment agreements with Beekman were breached. Beekman will be allowed to replead this aspect of the fifth claim, however, in a manner that clarifies the tort it asserts, and satisfies the pleading requirements of that tort.

Beekman's sixth cause of action seeks punitive damages. New York law does not recognize a separate claim for punitive damages, *see Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 38, 544 N.Y.S.2d 359, 370 (2d Dep't 1989), and the claim is dismissed, with leave, however, to add

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4 Crane urges that "any statements regarding Crane ending its relationship with Beekman would be true." While that may be the case from the time Crane decided to terminate Beekman's distributorship, there is no basis in the present record for finding that such statements were true beginning in 1988, when, Beekman alleges, they began. As to special damages, *see Brignoli v. Balch Hardy and Scheinman, Inc.*, 645 F. Supp. 1201, 1208 (S.D.N.Y. 1986). In *Diehl*, Judge Neaher noted that some cases did not require that special damages be pleaded, at least in certain situations, but in any event excused the pleading requirement in the case before him in view of deposition testimony before him on a motion for summary judgment. 445 F. Supp. at 292.

punitive damages to the *ad damnum* clauses of an amended complaint.

Conclusion

Beekman's motion for a preliminary injunction is denied. The complaint is dismissed, with leave to replead the third, fourth and fifth claims, and the *ad damnum* clauses, as set forth above, and without leave to replead the first, second and sixth claims. An amended complaint, if Beekman chooses to file one, is to be served and filed within 20 days of the date of this order.

Dated: New York, New York
February 28, 1991

SO ORDERED.

LAWRENCE M. McKENNA
U.S.D.J.

No. 91-1092

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

BEEKMAN PAPER CO.,
Petitioner,

v.

CRANE & CO., INC.; RICHARD W. KERANS; THOMAS A. WHITE; HAMILTON DAVIS,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 6, 1992

No. 91-1092

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

BEEKMAN PAPER CO., *Petitioner*,

v.

CRANE & CO., INC.; RICHARD W. KERANS; THOMAS A. WHITE; HAMILTON DAVIS,
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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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Preliminary Statement

Respondents/defendants in their opposition brief seek to defeat the petition upon the ground (among others) that petitioner has avoided the facts and that they are against petitioner beyond dispute.[1]

I

UNDER RULE 16.1 OF THIS COURT THE RECORD CAN BE SUMMONED AND THE PETITION SUMMARILY DISPOSED OF UPON THE MERITS

However unusual, this Court can and has summoned the record for review upon the merits. *See*, 16 Wright, Miller, Cooper, Federal Practice and Procedure § 4004, n. 64 (Supp West 1991) (exhaustive discussion and citation to this

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[1] Respondent is correct in pointing out, then adding in its own appendix, petitioner's failure to include the District Court opinions. Though such omission was unintentional, petitioner apologizes, thanking respondents for doing what should have been done in petitioner's appendix.

Moreover: for reasons advanced in this reply brief as well as subsumed in the petition, petitioner welcomes as full a record scrutiny of the facts as possible.

Court's holdings). So confident is petitioner that such review will result in reversal, it seeks, in addition to full review by way of grant of the petition, this alternative.

The full record (including if possible both the transcripts of all the oral arguments before the Circuit Court plus the recordings for listening) will show that the perjury of respondents suborned by its law firm was full before all the federal courts in the chain; and, that as a consequence, there is neither jurisdiction in the federal system save to so state, nor the need then for further activity via Rule 16.2.[2]

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[2] Inter alia this Court will find that the district court's findings [sic] of fact, often - even beyond their totally implausibility - represented that court's creating facts never advanced by respondents at any time. Not only did these "facts" appear only for the first time in the written opinion of the district court; but, literally, the court interjected itself as though a party rather than as the neutral trier of the facts. Worse, in the sense of the word, the district court *ex parte* intruded, because, despite lengthy briefings and oral argument, (preserved in the record by petitioner who ordered a transcript), the district court never even asked for party presentation about much of

That respondents seek - desperately - to both avoid the record and create the impression that petitioner is factually off the wall,[3] is further seen in its "PARTIES TO THE PROCEEDING" which lists only Technical Graphics, Inc. (Resp Br ii).

In fact, at all times relevant to the action, respondent admitted under both rule 9 of the Federal Rules of Civil Procedure and rule 26 of the Federal Rules of Appellate Procedure, an interested party to Crane & Co., Inc. was Byron Weston Company, a wholly owned subsidiary of Crane (R. 127-28; *see also* R. 206).[4]

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its implausible fact findings, waiting till written opinions to advance them for the very first time.

[3] That the district court and the circuit court ignored the record to achieve the hideous result extant, proves contrary to respondent's innuendo claim that petitioner is disgruntled, that the emperors wear no clothes.

[4] A minor fact since at best it raised a colorable argument of non diversity since Byron Weston and Crane shared New York offices. The point here is that - by commission (as respondents accused petitioner of intentional omission of the district court opinions) - respondents worry about the record, nudging it

Equally, to achieve a deleterious affect, in a pseudo-fact sense, respondents claim (Resp Br 2) that petitioner claimed the wrong basis for federal jurisdiction. Of course without diversity there would be no federal action, but - and this is the point - without legitimate removal - the diversity claim is for naught.

Respondents know this. The whole record shows their removal into the federal system was based solely on their sworn to papers claiming jurisdiction via the removal statute (R. 6,9, 22, 24-26).

Thus, again, respondents wish this court to believe petitioner hallucinates factually. Invoking rule 16.1, commanding the record, will put this scurrilousness to rest forever; allowing federalism to rise again.

Returning again to their paranoia over the record, respondents assert that this Court will not take fact based inquiry as reason to grant

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sharply to defeat certiorari.

a writ of certiorari, (Resp Br 2-3). Such, of course, is the general rule; petitioner knew it full well in its petition.

However:

> "The Supreme Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved....Only when the case acquires importance for some other reason will the Court accept review of such a case and reexamine the facts." Stern, Gressman & Shapiro, Supreme Court Practice, § 4.14 (1986; emphasis supplied).

Clearly, this matter involves, as our petition establishes, more than just the facts. Thus, as they do with the record, respondents screech in panic over the "other reason". There is no **FEDERALISM** issue here! (Resp Br 7-8).

No federalism? Incredible! On the contrary, if petitioner is correct, then there was no jurisdiction in any federal court to decide anything other than that! This does not properly invoke notions of federalism?[5]

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[5] If this Court summons the record, most notably the tape of the oral argument on petitioner's motion for a stay that proceeded

Respondents a/k/a Hauptman oppose certiorari claiming petitioner a/k/a Lindberg wants its baby back! How dare it raise this fact issue!

Upon further reflection, rule 16.1 would allow this Court to award sanctions. Let the petitioner and respondents - one or the other - put their money where their jurisprudential mouths are.

CONCLUSION

For the reasons expressed here and in the petition, it should be granted; or, alternatively, summary disposition be done on the merits.

Respectfully submitted,

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February 6, 1992

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the full appeal, it will hear petitioner's voice firm and clear articulating exactly this, followed by the circuit panel abruptly cutting him off.